87-764

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

No.

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL A. RILEY,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

1. WHETHER THE FLORIDA SUPREME COURT'S HOLDING THAT GROUND OBSERVATIONS FROM A HELICOPTER AT A LAWFUL ALTITUDE OF 400 FEET OVER RESIDENTIAL BACKYARDS VIOLATE REASONABLE EXPECTATIONS OF PRIVACY WITHIN THE MEANING OF THE FOURTH AMENDMENT CONFLICTS WITH CALIFORNIA V. CIRAOLO, 476 U.S. ___, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986)?

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OPINIONS BELOW

The decision in the court below is reported as Riley v. State, 511 So.2d 272 (Fla. 1987). (A-2-30).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the Florida Supreme Court on Petition for Certiorari under 28 U.S.C. §1257(3). The Florida Supreme Court decided this case on July 9, 1987 (A-2). Petitioner filed a motion for rehearing on July 23, 1987 (A-53-66). The court below denied that petition on September 11, 1987 (A-1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is applicable to the states through the offices of the Fourteenth Amendment. It provides:

> Section 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, Section 12 of the Florida Constitution provides:

> SECTION 12. **Searches and seizures.** - The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places or be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

In August, of 1984, Deputies Gell and Longworth of the Pasco County Sheriff's Office investigated an anonymous tip that Michael Riley was growing marijuana on a parcel of property he rented and occupied in Pasco County, Florida. After making a ground observation of tall plants growing in a greenhouse behind Riley's trailer, the officers obtained a helicopter and flew over the area. Flying at an altitude of approximately 400 feet, the officers observed through the two open sides and through missing panels in the roof of the greenhouse numerous marijuana plants growing. Based on this information the officers obtained a search warrant and seized 44 marijuana plants from the greenhouse.

Michael Riley was charged by information on August 16, 1984 with two counts of violating §893.13, Florida Statutes

(1983) (the unlawful manufacture and possession of marijuana). The defendant filed a motion to suppress evidence (A-42-45). After a hearing on the motion, the trial court issued its order suppressing the evidence on December 19, 1984. The facts of this case are set forth in detail in the trial court's order granting the Motion to Suppress. (A-46-52)

The state took an appeal to the Second District Court of Appeals for Florida. Florida's Second District reversed the trial court's order in its opinion issued on October 16, 1985. The opinion also certified a question to the Florida Supreme Court as one of great public importance (A-31-41).

The Florida Supreme Court reviewed the decision and reversed the district court's opinion on July 9, 1987 (A-2).

The state filed a motion for rehearing on July 11, 1987 (A-53). This motion

was denied on September 11, 1987 (A-1).

In the opinion below, the Florida Supreme Court held that the surveillance of the interior of a partially covered greenhouse in a residential backyard from a vantage point of a helicopter located 400 feet above the greenhouse constituted a "search" for which a warrant is required under the Fourth Amendment and Article I, §12 of the Florida Constitution. The decision found this to be true even though the court recognized that the helicopter was flying at a lawful height. The court found that although Riley may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, his expectation that its contents would not be examined from a helicopter hovering below 500 feet was not unreasonable.

The court contended that the heli-

copter was not in public navigable airspace because it was below the minimum altitude level for fixed-wing aircraft. The court opined that helicopters were more susceptible to abuse and invasion of privacy than ground surveillance or surveillance by fixed-wing aircraft. Based on the concern for technological advances expressed in Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), the Florida Supreme Court concluded that, even though the officers were in a place they had a right to be and made an observation that any member of the public in that space could have made, the surveillance by a helicopter flying at a lawful altitude violated Riley's Fourth Amendment right to privacy.

REASONS FOR GRANTING THE WRIT

1. WHETHER GROUND OBSERVATIONS FROM A HELICOPTER AT A LAWFUL ALTITUDE OF 400 FEET OVER RESIDENTIAL BACKYARDS VIOLATE REASONABLE EXPECTATIONS OF PRIVACY WITHIN THE MEANING OF THE FOURTH AMENDMENT?

The Florida Supreme Court has followed the California Court of Appeals' decision in People v. Sabo, 185 Cal.App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986), cert. denied, 107 S.Ct. 2200 (1987), and determined that a police officer cannot constitutionally view marijuana plants contained in a defendant's curtilage from a helicopter flying at a lawful altitude of 400 feet.[1]

1/ The case below rested on the 4th Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution. This section of the Florida Constitution requires that search and seizure cases be construed in conformity with the 4th Amendment to the United States Constitution as interpreted by the United States Supreme Court. Thus,

This contention conflicts with this Court's holding in California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986).

Ciraolo makes it clear that because an area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. Ciraolo, 90 L.Ed.2d at 216, citing United States v. Knotts, 460 U.S.

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jurisdiction rests in this Court based on both the 4th Amendment and Article I, Section 12. See, Oliver v. United States, 466 U.S. 170 (1984).

276, 282 (1983). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, at 351 (1967).

The fact that the Fourth Amendment may protect against entry in the absence of probable cause or a warrant does not mean that the Constitution erects a barrier to visual observation from areas open to the public. See, e.g., Texas v. Brown, 460 U.S. 730 (1983) (looking into an automobile); United States v. Santana, 427 U.S. 38 (1976) (observing individual in doorway of her home); United States v. Lee, 274 U.S. 559 (1927) (looking onto a boat dock). This conclusion is particularly apt in the case of the common law concept of curtilage, which originated in the course of defining what intrusions into the area of the home would constitute a burglary (see 4 W. Blackstone,

Commentaries on the Laws of England ch. 16, at 255 (Univ. of Chicago Press ed. 1979)); the notion of curtilage focuses on physical entry, not freedom from observation.

In United States v. Karo, 468 U.S. 705 (1984), and United States v. Knotts, 460 U.S. 276 (1983), the Court considered the Fourth Amendment implications of police monitoring of a "beeper" transmitting signals from, in, or near a privately owned building. The Court found manifestly unobjectionable the use of a beeper to obtain information available from visual surveillance, even if that surveillance extended up to the door of a residence. See Karo, 468 U.S. at 714; Knotts, 460 U.S. at 281-282, 285. The only Fourth Amendment problem arose from the use of the beeper "to obtain information that it could not have obtained by observation from outside the curtilage of the house"

Karo, at 715. In sum, the fact that government officials may lack authority in a given situation to enter the curtilage of a residence does not prevent them from standing outside the curtilage and looking inside to observe what is exposed to their view from that vantage point. See also Fullbright v. United States, 392 F.2d 432, 434-435 (10th Cir.), cert. denied, 393 U.S. 830 (1968)

Accordingly, this Court readily concluded in Ciraolo that where any member of the public flying at a lawful altitude who glanced down could have seen everything that these officers observed respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor. Id, 90 L.Ed.2d at 217.

It is clear that any helicopter pilot or passenger lawfully flying in this airspace could have seen everything that

these officers observed.

Nevertheless, the court below opines that although respondent may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in public navigable airspace, he did have a reasonable expectation that its contents would not be examined from a helicopter hovering below 500 feet.

The court concludes that because the surveillance was from a helicopter rather than an airplane, and was at 400 feet rather than 1000 feet (nevertheless conceding that the helicopter was flying at a permissible height) that the overflight violated Riley's reasonable expectation of privacy because it was below navigable airspace.

These are distinctions without differences that make it readily apparent the Florida Supreme Court merely disagrees

with this Court's decision in Ciraolo.

Petitioner contends that in terms of the Fourth Amendment helicopters are not distinguishable from airplanes and that "lawful flight" and "navigable airspace" are synonymous.

Navigable airspace is defined in 49 United States Code section 1301 (29), to wit:

> "(29) 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft."

In 14 Code of Federal Regulations section 91.79 the minimum altitudes for flight in navigable airspace are defined as:

> "§91.70 **Minimum safe altitude; general.**
>
> "Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

"(a) **Anywhere.** An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

"(b) **Over congested areas.** Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

"(c) **Over other than congested areas.** An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

"(d) **Helicopters.** Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to person or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator."

Thus, navigable airspace under the regulations is anywhere that would not constitute undue hazard to persons or property on the surface. (14 C.F.R., §91.79(a) and (c).) A helicopter flying at an altitude of 400 feet is in lawful flight within navigable airspace.

Even assuming this helicopter was not in navigable airspace, the flight in the instant case was not a violation of the Fourth Amendment because the flight was lawful under the federal regulations.

Congress's establishment of a public right to freedom of transit necessarily constitutes a decision in favor of the social and economic advantages of relatively unrestrained aviation at the expense of the loss of some degree of privacy from airborne observation. That privacy has been lost to the public, and it cannot be recaptured by reading the Fourth Amendment to impose special limitations upon the viewing ability of government officials.

Riley suggests that helicopters are

more offensive to Fourth Amendment rights than fixed wing aircraft because the helicopter can lawfully and safely fly at lower levels than airplanes. The court also distinguishes the helicopter based on its ability to hover, thereby allowing the helicopter passenger a better opportunity to view an individual's private activities.

Based on its reading of Katz v. United States, 389 U.S. 350 (1967), the Florida Supreme Court attempts to remove the helicopter flying at a lawful altitude from law enforcement's arsenal of crime fighting tools. In the opinion below, the court stated:

> . . . Katz warned of the dangers created by technological advances by which the police can conduct surveillance. Whether or not aerial surveillance is an example of such a technological advance, we believe it is more susceptible to abuse and invasion of privacy than ground surveillance.
>
> * * *

> Surveillance by helicopter is particularly likely to unreasonably intrude upon private activities.
>
> * * *
>
> Other courts have recognized that because of a helicopter's virtually unlimited maneuverability and observational capabilities, helicopter surveillance poses a serious risk to privacy.
>
> * * *
>
> We do not believe that the details observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft.

Riley, (A-21-23).

The use of helicopters is not a futuristic technological advance such as concerned the court in Katz. As this Court said in Ciraolo:

> "But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, (cites omitted) were plainly not aimed at simple visual observations from a public place."

* * *

> "One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future 'electronic' developments that could stealthily intrude upon an individual's privacy. Ciraolo, 90 L.Ed.2d 217, 218.

Further, the court's premise that the use of technology by law enforcement offends fourth amendment principles is unsupported in the instant case. In United States v. Knotts, 460 U.S. 276 (1983), this Court stated:

> Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Accordingly, the Florida Supreme Court's reliance on Katz, supra, to find a

fourth amendment violation in this case is simply misplaced. Justice Harlan's observations in Katz made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation has not been intercepted. Katz does not translate into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft -- or by a power company repair mechanic on a pole overlooking the yard. Ciraolo, supra, 90 L.Ed.2d at 217.

The court's concern that the contraband could not just as easily have been discerned by any person casually flying over is also contrary to this Court's holding in Ciraolo and Dow. Clearly in Ciraolo, the likelihood that a passenger on a plane might observe private

activities, and might connect those activities with particular people, was simply too trivial to protect against. See, Ciraolo, 90 L.Ed.2d at 223 (Powell, L., dissenting). Further, this Court in Ciraolo also made it clear that a focused surveillance does not violate fourth amendment rights against search and seizure.

There is nothing in this record to support the conclusion that the helicopter caused any disturbance by hovering and circling or that it was even noticed by the occupants. In fact, Detective Gell testified that they only flew over the property twice at a level of 400 feet. 400 feet is equivalent to a 40 story office building. Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. "[W]e have never held that potential, as opposed to actual invasions of privacy constitutes

searches for purposes of the fourth amendment." Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986); citing United States v. Karo, 468 U.S. 705, 712 (1984). And, as this Court recognized in United States v. Knotts, 460 U.S.276 (1983):

> But the fact is that the "reality hardly suggests abuse," Zurcher v. Stanford Daily, 436 U.S. 547, 566, 56 L.Ed.2d 525, 98 S.Ct. 1970 (1978); if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. Ibid. Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.
>
> Id at 283-284.

Nothing in this case suggests that any reasonable expectations of privacy have been infringed.

Detective Gell was flying at a lawful

altitude and made an observation that any member of the public lawfully flying in this airspace could have made. Cf. Ciraolo, 90 L.Ed.2d at 217. Before making any physical intrustion into the curtilage the detectives obtained a warrant to enter Riley's premises and seize the contraband. Riley's Fourth Amendment rights were not violated.

CONCLUSION

This Court should grant the instant petition and summarily vacate the lower court's decision based on Ciraolo, supra. Alternatively, the Court should grant the petition and order plenary review.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, PEGGY A. QUINCE, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on this _____ day of November, 1987, I served three copies of the Petition for Writ of Certiorari on MARC H. SALTON, Esquire, 4911 C. R. 54, New Port Richey, Florida 33552, by a duly addressed envelope with postage prepaid.

_____
OF COUNSEL FOR PETITIONER

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

_____

No.

_____

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL A. RILEY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A P P E N D I X

Order of Florida Supreme Court denying Motion for Rehearing A-1

Opinion of the Florida Supreme Court A-2

Opinion of the District Court of Appeal, Second District A-31

Motion to Suppress filed in the Circuit Court A-42

Order of the Circuit Court granting Defendant's Motion to Suppress A-46

Motion for Rehearing A-53

IN THE SUPREME COURT OF FLORIDA
FRIDAY, SEPTEMBER 11, 1987

MICHAEL A. RILEY,	**	
Petitioner,	**	CASE NO. 67,906
vs.	**	
STATE OF FLORIDA,	**	District Court of Appeal, 2d District - No. 84-2818
Respondent.	**	

On consideration of the motion for rehearing filed by attorney for respondent,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy
TEST:

Pittman, Clerk
Sid J. White
Clerk Supreme
Court

By: /s/
Chief Deputy

C

cc: Hon. William A. Haddad, Clerk
Hon. Joseph E. Hon. Hon. W. Lowell Bray, Jr., Judge

Candance M. Sunderland, Esquire
Marc H. Salton, Esquire

SUPREME COURT OF FLORIDA

No. 67,906

MICHAEL A. RILEY, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

[July 9, 1987]

BARKETT, J.

We have for review State v. Riley, 476 So.2d 1354 (Fla. 2d DCA 1985), in which the district court upheld the validity of a seizure of marijuana under a search warrant obtained as the result of aerial surveillance and certified the following as a question of great public importance:

> WHETHER POLICE OFFICER, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PRE-INTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELLING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

Id. at 1356-57.

Because the certified question as stated contains language inconsistent with established search-and-seizure analysis, we restate the question as follows:

> WHETHER SURVEILLANCE OF THE INTERIOR OF A PARTIALLY COVERED GREENHOUSE IN A RESIDENTIAL BACKYARD FROM THE VANTAGE POINT OF A HELICOPTER LOCATED 400 FEET ABOVE THE GREENHOUSE CONSTITUTES A "SEARCH" FOR WHICH A WARRANT IS REQUIRED UNDER THE FOURTH AMENDMENT AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION?

The issue here is one of first impression in this state and one which obviously involves serious questions of public policy. We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution, answer the restated

question in the affirmative, and quash the decision of the district court below.

Petitioner, Michael A. Riley rented approximately five acres of rural property on which was located a mobile home which petitioner used as a residence. The greenhouse in question was located ten to twenty feet behind the mobile home. Both buildings were enclosed by a net wire fence. A "DO NOT ENTER" sign was posted in front of the mobile home. The greenhouse was enclosed on two sides; the remaining sides were obscured by trees and shrubbery within the fenced area and the mobile home. Two panels were missing from the roof of the greenhouse, exposing approximately one-tenth of the roof area.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon an anonymous tip that marijuana was being grown on petitioner's property, went to investigate. Unable to discern the con-

tents of the greenhouse from the road, Deputy Gell obtained a helicopter and flew over petitioner's property at about 400 feet.[1] Through the openings in the roof and through one or more of the open sides of the greenhouse, he saw what he believed to be marijuana. Based upon his observations from the helicopter, Deputy Gell then obtained a warrant to search the greenhouse.[2]

The search warrant was executed and forty-four marijuana plants were found growing in the greenhouse. Petitioner was charged with unlawful possession and manufacture of marijuana under section 893.13,

---

[1] The evidence was unclear as to whether the helicopter descended below 400 feet. The helicopter did circle over the greenhouse twice. Riley, 476 So.2d at 1355.

[2] Although Deputy Gell also took photographs of the greenhouse from the air, the trial judge apparently accepted his statement that he identified the marijuana from the air and not from the photographs. Riley, 476 So.2d at 1355.

Florida Statutes (1983). The trial court granted petitioner's motion to suppress the evidence on the ground that petitioner manifested a reasonable expectation of privacy from aerial surveillance. On appeal, the Second District reversed on the authority of its own decision in Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984),[3] and certified the issue to the Court.

Petitioner, relying on Katz v. United States, 389 U.S. 347 (1967), contends that the aerial surveillance of his greenhouse was a search in violation of his rights under the fourth amendment to the United States Constitution and article I, section 12 of the Florida Constitution. The state counters that the surveillance was a legally permissible "preintrusion view" in

[3] In that case, the district court certified a similar question to the Court, but the parties did not pursue the issue. Randall, 458 So.2d at 826.

accordance with this Court's decision in State v. Rickard, 420 So.2d 303 (Fla. 1982), and the Second District's decision in Randall v. State. We agree with petitioner that under the facts of this case the helicopter surveillance by the state constituted a search and an impermissible violation of privacy rights.

We begin our analysis with two recent United States Supreme Court decisions involving aerial surveillance, California v. Ciraolo, 106 S.Ct. 1809 (1986), and Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986).[4]

In Ciraolo, police flew over the defendant's property in a fixed-wing plane at a height of 1,000 feet to confirm an anonymous tip that the defendant was growing marijuana in his backyard. The property was surrounded by a ten foot high

[4] These cases were decided after the decision of the Second District below.

fence, preventing ground level observation. In Dow Chemical, a government regulatory agency took aerial photographs of Dow's industrial complex from altitudes of 12,000, 3,000, and 1,200 feet. Extensive security prevented any public viewing of the facility.

The Court reaffirmed the standard established in Katz and then applied the Katz test to the aerial surveillance which had occurred in each case. Under the Katz standard, the legality of a warrantless police intrusion into allegedly private activities depends upon whether a person has a "reasonable" expectation of privacy in the invaded area. Id., 389 U.S. at 360 (Harlan, J., concurring). In Katz, the Supreme Court abandoned the traditional analysis which defined a search by reference to whether the police had committed a physical trespass, see Olmstead v. United States, 277 U.S. 438 (1928), and shifted

the focus to whether the government had violated the privacy upon which the individual had justifiably relied. Katz, 389 U.S. at 353. Recognizing that the "constitutionally protected areas" approach provided no real protection against surveillance techniques made possible through advancing technology, the Court made clear that "the Fourth Amendment protects people, not places."[5] Id. at 351-52. Thus, "[w]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id.

Katz and its progeny established a two-pronged test for determining whether the government has intruded upon an indi-

[5] This does not mean that the location of the observed activities or objects has no bearing on search-and-seizure analysis. The question whether a legitimate expectation of privacy has been invaded generally requires reference to a place. Katz, 389 U.S. at 361.

vidual's reasonable expectation of privacy. First, an individual by his conduct must exhibit an actual subjective expectation of privacy. Second, society must be willing to recognize that expectation as reasonable. Smith v. Maryland, 442 U.S. 735, 740 (1979) (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring)); Norman v. State, 379 So.2d 643, 647 (Fla. 1980).

The Ciraolo court, having determined that the yard in question was within the curtilage of the defendant's home, found that "[c]learly--and understandably--" the defendant had met the test of manifesting his own subjective intent and desire to maintain privacy. 106 S.Ct. at 1811. The Court noted that the protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home both physically and psychologically "where pri-

vacy expectations are most heightened." Id. at 1812.

The inquiry in Ciraolo thereafter centered on the second prong of Katz, specifically, "whether naked-eye observation of the curtilage by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable." Id. at 1812. The Court decided that the expectation was not reasonable where:

> The observations . . . took place within public navigable airspace . . . in a physically nonintrusive manner; from this point they [the police] were able to observe plants readily discernable to the naked eye as marijuana. . . . Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

106 S.Ct. at 1813 (emphasis supplied, citation omitted).

In Dow Chemical, decided the same date as Ciraolo, the Court upheld the warrantless taking of aerial photographs, again limiting its holding to observations made from public navigable airspace:

> We conclude that the open areas of an industrial plant complex . . . are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; . . . such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

Id. at 1827 (footnote omitted). The Court also rested its conclusion on the fact that the area at issue was not an area immediately adjacent to a private home, where privacy expectations are most heightened, nor an area where Dow had made any effort to protect against aerial surveillance. Id. at 1826 n.4.

In light of Ciraolo and Dow Chemical, we believe the state's reliance on Rickard

is misplaced. Rickard did not deal with aerial surveillance such as we have here nor with any other modern surveillance technologies against which a citizen can do little to protect. In Rickard, police were lawfully in a neighbor's orange grove when they observed marijuana growing in Rickard's backyard. The plants were open to naked-eye view by any casual observer. Clearly, Rickard had made no attempt to prevent observations from the orange grove and, therefore, had not exhibited a reasonable expectation of privacy in his backyard from naked-eye observations from neighboring property. Accordingly, we held that the police observations in that case were not a search but were a legally permissible "preintrusion view" which occurs when a police officer who is located where any citizen has a right to be can look into the protected area and, in a reasonable manner, observes

contraband. Rickard, 420 So.2d at 305; Ensor v. State, 403 So.2d 349, 352 (Fla. 1981).[6] Such observations are generally permissible because an individual has no expectation of privacy in objects or activities knowingly exposed to the public. See Katz, 389 U.S. at 351.

Under Katz, however, the determination of whether a police officer is in a place where he or she has a right to be is not always conclusive of whether the particular conduct constitutes a search. The essential teaching of Katz is that private

[6] Because the police are not already legally within the protected area when the observation is made, they must obtain a warrant before entering the protected area to seize the contraband. A "preintrusion view" is thus different from the "plain view" exception to the fourth amendment's warrant requirement established in Coolidge v. New Hampshire, 403 U.S. 443 (1971). See Ensor. Under the "plain view doctrine," when police legally within a constitutionally protected area observe, without the benefit of a search, evidence which they have probable cause to believe is contraband, they may seize it without a warrant.

activities do not lose their fourth amendment protection merely because technology exists which enables the police to view the activities from an otherwise nonintrusive vantage point. See, e.g. Wheeler v. State, 659 S.W.2d 381 (Tex.Crim.App. 1982) (protracted surveillance of contents of greenhouse with telescopes and lenses of increasing magnitude constitutes a search). Wherever an individual harbors a "reasonable expectation of privacy," he or she is entitled to be free from unreasonable government intrusion.[7]

We turn now to the case at hand. As in Ciraolo, there is no question in this case that the first prong of the Katz test has been met. Petitioner clearly exhib-

[7] Accordingly, we have restated the certified question to avoid the implication that an alleged search might be valid despite the finding that both prongs of the Katz test have been satisfied, to wit, that the appropriately manifested expectation of privacy in the area searched was reasonable.

ited a subjective expectation of privacy in the greenhouse and its contents and thus we concur with the trial court and the district court in this regard. The opacity of the greenhouse, the fence surrounding it, and the "KEEP OUT" sign all show petitioner's subjective expectation that the interior of the greenhouse would remain shielded from earthbound and aerial observation. The fact that a few panels in the roof were missing does not alter our conclusion. Similar efforts have been held to establish a subjective expectation of privacy, and thus to satisfy the first prong of Katz. See e.g., People v. Sabo, 185 Cal.App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986) (reasonable expectation of privacy in greenhouse partially screened by evergreens and from which some roof and side panels were missing), cert. denied, 107 S.Ct. 2200 (1987); Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977) (reason-

able expectation of privacy in hothouse located on residential premises even though plastic covering may have allowed someone to look in from the outside); State v. Knight, 63 Haw. 90, 621 P.2d 370 (1980) (defendant's covering of greenhouse with materials so as to shield contents demonstrated subjective expectation of privacy); Wheeler v. State, 659 S.W.2d 381 (Tex.Crim.App. 1982) (subjective expectation of privacy in greenhouse despite four foot square louvered opening for purpose of ventilation).

Moreover, as in Ciraolo, we find that the area in question constituted the curtilage. State and federal courts have long recognized that the curtilage concept extends to residential backyards and outbuildings located within close vicinity of the residence. Taylor v. United States, 286 U.S. 1, 6 (1932); United States v. Williams, 581 F.2d 451, 454 (5th Cir.

1978), cert. denied, 440 U.S. 972 (1979); Walker v. United States, 225 F.2d 447, 449 (5th Cir. 1955); State v. Rickard, 420 So.2d 303, 306 (Fla. 1982); Norman v. State, 379 So.2d 643 (Fla. 1980); Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977); Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974); State v. Fierge, 673 S.W.2d 855, 856 (Mo.App. 1984); Brown v. Oklahoma City, 721 P.2d 1346, 1349 (Okla. App. 1986).

Traditionally, the fourth amendment provides a high degree of protection to the curtilage of a residence, those areas "immediately adjacent to the home" to which extend "the intimate activity associated with the 'sanctity of a [person's] home and the privacies of life' [citation omitted] . . ." Oliver v. United States, 466 U.S. 170, 180 (1984). Indeed, the curtilage "has been considered part of [the] home itself for Fourth Amendment

purposes . . ." Id. at 170. The reason for this was expressed well by the Sixth Circuit in Dow Chemical Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984):

> The doctrine of curtilage is grounded in the peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home. The home is fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways. The potent individual privacy interests that inhere in living within a home expand into the areas that enclose the home as well. The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is . . . true because people have both actual and reasonable expectations that many of the private experiences of home life often occur outside the house. Personal interactions, daily routines and intimate relationships revolve around the entire home place.

We are left with the question of whether the observation from the air in this case violates an expectation of privacy

that is reasonable.

After Ciraolo, there is little question that naked-eye observations of marijuana growing in an enclosed backyard from fixed-wing aircraft within navigable airspace do not violate the federal constitution. However, we do not read Ciraolo as sanctioning an unlimited right to any type of examination of residential property from the air. Indeed, we note the care taken to qualify and limit the permissible observation to the "naked eye" from "navigable air space" at an "altitude of 1000 feet" in a "physically nonintrusive manner."[8]

These are not the facts presently

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[8] In a footnote to its conclusion, the Court noted that the state conceded that "'[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.'" Ciraolo, 106 S.Ct. at 1813-14 n.3.

before us. We simply cannot dismiss as irrelevant the difference between a fixed-wing aircraft flying at 1,000 feet and a helicopter circling and hovering at 400 feet so that its occupants can look through an opening in a roof.

As we already have noted, Katz warned of the dangers created by technological advances by which the police can conduct surveillance. Whether or not aerial surveillance is an example of such a technological advance,[9] we believe it is more susceptible to abuse and invasion of privacy than ground surveillance. As the California Supreme Court recognized in People v. Cook, 41 Cal.3d 373, 382, 221 Cal.Rptr. 499, 505, 710 P.2d 299, 305

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[9] At least one court has so held. United States v. Broadhurst, 805 F.2d 849, 853 n.3 (1986). But see State v. Myrick, 102 Wash.2d 506, 688 P.2d 151 (1984) (rejecting the contention that aircrafts generally are overly intrusive technological devices when used for surveillance purposes).

(1985), the concept of protected areas has little meaning when it comes to aerial surveillance:

> Purposeful surveillance from the air simply lays open everything and everyone below--whether marijuana plants, nude sunbathers, or family members relaxing in their lawn chairs-- to minute inspection. The usual steps one might take to protect his privacy are useless.

Surveillance by helicopter is particularly likely to unreasonably intrude upon private activites. The first court to find aerial surveillance unconstitutional did so because the police hovered in their helicopter twenty to twenty-five feet above the ground and 125 feet away from appellant's residence in an effort to identify marijuana in a corral. People v. Sneed, 32 Cal.App.3d 535, 108 Cal.Rptr. 146 (1973). Other courts have recognized that because of a helicopter's virtually unlimited maneuverability and observational capabilities, helicopter surveillance poses a serious risk to privacy. See National Organization For Reform of Marijuana Laws (NORML) v. Mullen, 608 F.Supp. 945 (M.D.Cal. 1985) (highly disruptive character of low helicopter flights distinguishes them from common airplane overflights to which society is accustomed), remanded, 796 F.2d 276 (9th Cir. 1986). In People v. Sabo, 185 Cal. App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986), the court invalidated a warrantless aerial search under circumstances nearly identical to those here. Noting that helicopters may lawfully be operated in nonnavigable airspace,[10] the court con-

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[10] The Sabo court relied on federal law defining navigable airspace as that airspace above the minimum altitudes of flight prescribed by the regulations of the Civil Aeronautics Board. 49 U.S.C. §§ 1304, 1301(29). The minimum altitude for a fixed wing aircraft is 1,000 feet over a congested area and 500 feet over a non-congested area. 14 C.F.R. § 91.79(b) & (c) (1986). Helicopters may be lawfully operated at less than minimum altitudes,

cluded that such lawful operation did not fall within the aerial surveillance approved in Ciraolo and Dow Chemical. In reaching this conclusion, the court judicially noticed the unique capabilities of the helicopter as compared to fixed-wing aircraft:

> To say any sighting from a helicopter in nonnavigable airspace validates a search warrant sanctions a broad range of aerial acrobatics performed in lawful manner but admittedly intrusive, such as interminable hovering, a persistent overfly, a treetop observation, all accompanied by the thrashing of the rotor, the clouds of dust, and earsplitting din. Views from navigable airspace are far removed from the situs observed . . . [whereas] [t]he lawfully operated helicopter need stand back only such distances as not to hazard persons or property.

Id. at 175-76.

We do not believe that the details

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and therefore below navigable airspace, so long as the operation is conducted "without hazard to persons or property on the surface." 14 C.F.R. §91.70(d) (1986). 23 Cal.Rptr. at 174-75.

observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft. Cf. Ciraolo, 106 S.Ct. at 1813. The possibility of observation of the interior of a greenhouse by passengers on commercial and private aircraft in the public airways is extraordinarily remote. Even more remote is the possibility that an observer would connect what he or she observed to a specific person. Although petitioner may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, we do not find unreasonable his expectation that its contents would not be examined from a helicopter hovering below 500 feet.

We are not unmindful of the legitimate law enforcement interests at stake

here; we simply do not find the governmental intrusion in this case necessary to advance those objectives. We believe law enforcement can achieve its objectives without so infringing upon the privacy rights of Florida citizens.

The fourth amendment reflects a choice that our society should be one in which citizens "dwell in reasonable security and freedom from surveillance." Johnson v. United States, 333 U.S. 10, 14 (1948). Our own right to privacy amendment, article I, section 23, Florida Constitution, was meant to protect against governmental encroachments on privacy made possible by increasingly sophisticated investigative techniques. See Constitution Revision Commission proceedings (July 6, 1977) (address by Chief Justice Ben Overton); see also Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 F. S.U. L.Rev. 671, 721-22 & 759 (1978). As

United States Supreme Court Justice Brennan observed in United States v. Dunn, 107 S.Ct. 1134 (1987) (Brennan, J., dissenting), the fourth amendment prohibits police activity which, if left unrestricted, would jeopardize individuals' sense of security or would too heavily burden those who wish to guard against their privacy. We believe the intrusion in this case is such a burden.

There is little that an individual can do to bar either the public or police from aerial viewing of an open area, even if the area is within the curtilage and otherwise entitled to fourth amendment protection. We cannot believe that society is prepared to say that individuals relinquish all expectations of privacy in their residential yards merely because they have not taken the extraordinary steps required to protect against all types of aerial surveillance.[11] The

right to be let alone includes not only the right to be free from surveillance within the confines of four walls and a roof but also the right to enjoy outdoor activities in private in one's own backyard. See State v. Ward, 62 Haw. 509, 517, 617 P.2d 568, 573 (1980) (constitution does not require person to shut himself off from "fresh air, sunlight and scenery"); Wheeler, 659 S.W.2d at 390 (constitution does not require that one erect a stone bastion, or retreat to the cellar to exhibit a reasonable expectation of privacy).

Recognizing that the question in this case is a close one, we think the Supreme Court's admonition of over a century ago bears repeating:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.

Boyd v. United States, 116 U.S. 616, 635 (1886).

Accordingly, we find that petitioner had a reasonable expectation that his activities inside the greenhouse would remain private and out of the view of aerial observers. In circling and descending below "public navigable airspace," Detective Gell impermissibly invaded Riley's privacy and his observations thus constituted a search under the fourth amendment to the federal constitution and article I, section 12 of the Florida Constitution. We, therefore, quash the decision of the Section District and remand for reinstatement of the trial court's suppression order.

It is so ordered.

McDONALD, C.J., OVERTON, EHRLICH AND SHAW, JJ., and ADKINS, J. (Ret.), concur

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[11] To require persons to erect such barriers is akin to requiring people to install lead insulation to protect against x-ray surveillance of their homes.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 84-2818

Marc H. Salton, New Port Richey, Florida,
for Petitioner

Robert A. Butterworth, Attorney General and Candance M. Sunderland, Assistant Attorney General, Tampa, Florida,
for Respondent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Appellant, v. MICHAEL A. RILEY, Appellee.	)	CASE NO. 84-2818

Opinion filed October 16, 1985.

Appeal from the Circuit Court for Pasco County; W. Lowell Bray, Jr., Judge.

Jim Smith, Attorney General, Tallahassee, and Candance M. Sunderland, Assistant Attorney General, Tampa, for Appellant.

Marc H. Salton, New Port Richey, for Appellee.

GRIMES, Acting Chief Judge.

This appeal passes on the validity of a seizure of marijuana under a search warrant obtained as a result of aerial surveillance.

On appellant's motion to suppress, the trial court entered a comprehensive order which reads as follows:

O R D E R

THIS MATTER coming on to be heard on the 14th day of December 1984, upon the Defendant's Motion to Suppress, and the Court being duly advised in the premises, the Court finds that the testimony and photographic evidence introduced in this case establish the following:

The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs. The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.

The major out-building is located about 10' to 20' to the rear of the mobile home. This

building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to

whether the helicopter descended below 400 feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.

On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

Based on these facts, the Court holds:

That the Defendant exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration of Rights. Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area. In addition, the roof or covering over the area in which the plants were located is a clear indicium of a desire for privacy from observation from the air. The structure, having two open sides, affords its contents scant protection from inclement weather and serves no purpose other than to obstruct the view

of its contents. Likewise, the purpose of the opening in the roof was not to allow a viewing of the contents but was to admit sunlight (compare the plastic sheets in Huffer v. State, 344 So.2d 1332 [Fla. 2d DCA 1977]) and possibly permit circulation of air.

The Court notes that this case is distinguishable from the cases of Diehl v. State, 9 FLW 2505, 1 DCA, Fla., 12/3/84, Brennan v. State, 417 So.2d 1024, (Fla. 2nd DCA 1982) and Murphy v. State, 413 So.2d 1268, (1DCA, Fla. 1982), all of which involved aerial viewings of open fields. The Court further notes that this case is distinguishable from Randall v. State, 9 FLW 2354, November 16, 1984, in that the Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance.

The Court does not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area. It is therefore

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is granted, and the evidence seized pursuant to the execution of the search warrant is hereby suppressed.

DONE AND ORDERED in Chambers, at New Port Richey,

Florida, this 19th day of December, 1984.

/s/ W. Lowell Bray, Jr.
W. Lowell Bray, Jr.
Circuit Judge

Though not noted in his order, the trial judge, at the hearing, specifically accepted as true the deputy's statement that he could see the marijuana plants from his position of aerial surveillance.

On appeal, the state argues that this case must be reversed on the authority of Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984). We agree.

In order to fully appreciate the Randall decision, it is first necessary to discuss the case of State v. Rickard, 420 So.2d 303 (Fla. 1982). In Rickard, the police had seized marijuana from the defendant's back yard after having observed the contraband from an orange grove behind the defendant's property. Because the defendant had taken steps to block the

view of his back yard from his only adjacent neighbor, the supreme court held that the defendant had exhibited a reasonable expectation of privacy in that area and quashed the warrantless seizure. However, the supreme court specifically held that the officer's initial observation of the marijuana from the orange grove qualified as a legally permissible preintrusion open view rather than a search. The seizure of the marijuana was not quashed because of the officer's conduct in viewing the defendant's back yard from the nearby grove but because of his failure either to obtain a search warrant authorizing the seizure or to demonstrate an exception to the warrant requirement.

In Randall, the police received a tip that the defendant was growing marijuana behind his house, but the plants could not be observed from the ground because the back yard was surrounded by a reed

fence. However, the police were able to identify the marijuana from the vantage point of a helicopter flying at a routine patrol altitude. After analyzing Rickard, the court concluded that the appellant had exhibited a reasonable expectation of privacy from view not only from the ground but also from the air despite the lack of any shielding from aerial observation. Notwithstanding, the court concluded that the aerial surveillance made by the police from a place where they had a legal right to be did not constitute a governmental intrusion which rose to the level of an impermissible search. Thus, the police were entitled to use the information obtained from the aerial view as the basis for probable cause to obtain a search warrant. The court concluded:

> While the efforts undertaken by police officers in order to gain a view into a constitutionally protected area undoubtedly must be considered in determining

> the degree of governmental intrusion, we do not deem aerial observation alone to be unreasonably intrusive under the circumstances presented. Society appears willing to accept aerial surveillance as a reasonable and necessary investigative tool in effective modern law enforcement. Furthermore, we do not believe that requiring police to procure a warrant before executing an general aerial overflight such as that conducted in the instant case would significantly advance the protection of legitimate privacy interests. See Oliver v. United States, ___ U.S. ___, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (addressing, peripherally, aerial surveillance of an open field). In short, we conclude that the non-harassing surveillance conducted in the instant case struck an acceptable balance between society's interest in effective modern law enforcement and the individual's interest in the values protected by the fourth amendment.

458 So.2d at 825-826.

The instant case differs from Randall only in the fact that the appellant had erected a roof over most of his greenhouse. Consequently, this provided a basis for the judge to conclude that appellant had demonstrated a reasonable

expectation of privacy from aerial surveillance. However, the Randall case was decided on the same principle because the court acknowledged that by having fenced his property from ground observation, it was unnecessary for the defendant to construct an "opaque bubble" over his back yard in order to manifest a reasonable expectation of privacy, even from aerial surveillance. Therefore, appellant's effort to cover his greenhouse from aerial observation becomes an irrelevant distinction from Randall.

Recognizing that its interpretation was one of first impression in Florida, the Randall court certified a question to the supreme court. Since the parties did not further pursue the case, there is no supreme court authority on the subject. Hence, we certify the following question to the supreme court as one of great public importance:

WHETHER POLICE OFFICERS, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PREINTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

REVERSED.

FRANK and HALL, JJ., Concur.

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT OF THE STATE
OF FLORIDA, IN AND FOR
PASCO COUNTY

8401606CFAWS

STATE OF FLORIDA :
:
vs. :
:
MICHAEL A. RILEY :

MOTION TO SUPPRESS

COMES NOW the Defendant, MICHAEL A. RILEY, by and through the undersigned attorney, pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure and hereby moves this Honorable Court for an Order suppressing all quantities of marijuana seized from the defendant or his residence on August 16, 1984 and as grounds therefor would allege:

1. That on August 16, 1984 officers of the Pasco County Sheriff's Department secured a search warrant for the residence of the defendant.

2. Pursuant to the execution of the search warrant several quantities of marijuana were seized from the defendant's residence and property.

3. Prior to securing said search warrant, Deputy Robert Longworth, Pasco County Sheriff's Department, received information that marijuana was growing on the defendant's property.

4. Deputy Robert Longworth attempted to view marijuana from the roadway surrounding the defendant's property but could only see a greenhouse behind the defendant's trailer and could not tell what was growing within said greehouse [sic].

5. Officers of the Pasco County Sheriff's Department then flew a helicopter and hovering over the defendant's greenhouse, then attempted to view what was growing in said greenhouse through openings in the roof of said greenhouse.

6. Based on testimony that the

expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in navigable public airspace, we do not find unreasonable his expectation that its contents would not be examined from a helicopter hovering below 500 feet.

We are not unmindful of the legitimate law enforcement interests at stake here; we simply do not find the governmental intrusion in this case necessary to advance those objectives. We believe law enforcement can achieve its objectives without so infringing upon the privacy rights of Florida citizens.

The fourth amendment reflects a choice that our society should be one in which citizens "dwell in reasonable security and freedom from surveillance." Johnson v. United States, 333 U.S. 10, 14 (1948). Our own right to privacy amendment, article I, section 23, Florida Constitution, was

meant to protect against governmental encroachments on privacy made possible by increasingly sophisticated investigative techniques. See Constitution Revision Commission proceedings (July 6, 1977) (address by Chief Justice Ben Overton); see also Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 F.S.U. L.Rev. 671, 721-22 & 759 (1978). As United States Supreme Court Justice Brennan observed in United States v. Dunn, 107 S.Ct. 1134 (1987) (Brennan, J., dissenting), the fourth amendment prohibits police activity which, if left unrestricted, would jeopardize individuals' sense of security or would too heavily burden those who wish to guard against their privacy. We believe the intrusion in this case is such a burden.

There is little that an individual can do to bar either the public or police from aerial viewing of an open area, even

if the area is within the curtilage and otherwise entitled to fourth amendment protection. We cannot believe that society is prepared to say that individuals relinquish all expectations of privacy in their residential yards merely because they have not taken the extraordinary steps required to protect against all types of aerial surveillance.[11] The right to be let alone includes not only the right to be free from surveillance within the confines of four walls and a roof but also the right to enjoy outdoor activities in private in one's own backyard. See State v. Ward, 62 Haw. 509, 517, 617 P.2d 568, 573 (1980) (constitution does not require person to shut himself off from "fresh air, sunlight and scenery"); Wheeler, 659 S.W.2d at 390

11/ To require persons to erect such barriers is akin to requiring people to install lead insulation to protect against x-ray surveillance of their homes.

(constitution does not require that one erect a stone bastion, or retreat to the cellar to exhibit a reasonable expectation of privacy).

Recognizing that the question in this case is a close one, we think the Supreme Court's admonition of over a century ago bears repeating:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.

Boyd v. United States, 116 U.S. 616, 635 (1886).

Accordingly, we find that petitioner had a reasonable expectation that his activities inside the greenhouse would remain private and out of the view of aerial observers. In circling and descending below "public navigable airspace," Detective Gell impermissibly invaded Riley's privacy

and his observations thus constituted a search under the fourth amendment to the federal constitution and article I, section 12 of the Florida Constitution. We, therefore, quash the decision of the Second District and remand for reinstatement of the trial court's suppression order.

It is so ordered.

McDONALD, C.J., OVERTON, EHRLICH and SHAW, JJ., and ADKINS, J. (Ret.), concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 84-2818

Marc H. Salton, New Port Richey, Florida,

for Petitioner

Robert A. Butterworth, Attorney General and Candance M. Sunderland, Assistant Attorney General, Tampa, Florida,

for Respondent

IN THE SUPREME COURT OF FLORIDA

MICHAEL A. RILEY,)
Petitioner,)
v.) Case No. 67,906
STATE OF FLORIDA,)
Respondent.)

MOTION FOR REHEARING

Pursuant to Florida Rule of Appellate Procedure, 9.330, Respondent moves for a rehearing of this Court's opinion of July 9th, 1987, on the grounds that this Court overlooked or misapprehended the following:

I.

Michael A. Riley did not exhibit a subjective expectation of privacy from aerial viewing.

And, the officers in the instant case were in a place where they had a right to

be when they spotted the contraband and accordingly, the viewing did not constitute a search within the context of the fourth amendment.

II.

As a basis for this Court's decision in Riley, the Court stated:

> Petitioner clearly exhibited a subjective expectation of privacy in the greenhouse and its contents and thus we concur with the trial court and the district court in this regard. The opacity of the greenhouse, the fence surrounding it, and the "KEEP OUT" sign all show petitioner's subjective expectation that the interior of the greenhouse would remain shielded from earth-bound and aerial observation. The fact that a few panels of the roof were missing does not alter our conclusion.

Riley, page 7. (emphasis supplied).

The State does not agree that Riley exhibited a subjective expectation of privacy.

In California v. Ciraolo, 476 U.S. __, 90 L.Ed.2d 210, 106 S.Ct. __ (1986), the United States Supreme Court took care to note that it was not addressing the issue of whether Ciraolo had manifested a subjective expectation of privacy from all observations of his backyard, or whether he instead manifested merely a hope that no one would observe his unlawful gardening pursuits. Id. at 90 L.Ed.2d 216.

Petitioner's greenhouse was located in a rural area. The photographs included in the record on appeal show that approximately 1/8th of the roof was uncovered and of the remaining portion the contraband could be readily viewed through 1/2 of one side of the roof. The remaining roofing was made of white fiberglass covering which allowed light to enter the structure. Further, the building was enclosed only on two sides. One of the remaining sides was

open to an area of trees and shrubbery and the fourth side was screened by a mobile home. The marijuana was clearly visible through the roof and the sides.

Here, as in Ciraolo, the petitioner's actions manifested no more than a hope that no one would observe his unlawful gardening pursuits.

III.

In Riley, this Court concedes that the officers were in a place they had a right to be. Nevertheless, the Riley decision suggests that this is not determinative under Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

> "Under Katz, however, the determination of whether a police officer is in a place where he or she has a right to be is not always conclusive of whether the particular conduct constitutes a search. The essential teaching of Katz is that private activities do not lose their fourth amendment

> protection merely because technology exists which enables the police to view the activities from an otherwise nonintrusive vantage point."

Id. at page 6.

First, Katz rested on a determination that the technology used allowed the officers to intercept a private conversation.

> "The critical facts in this case is that '[o]ne who occupies it, [a] telephone booth shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted. Ante, at 582. The point is not that the booth is 'accessible to the public' at other times, ante, at 582, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.

Katz, at 361.

Nothing in the Katz opinion suggests that Katz' fourth amendment rights would have been violated had the officers simply overheard the conversation while standing outside the phone booth. In other words,

had the officers been in a place where they had a right to be, rather than intruding into the occupant's expectation of privacy, there would not have been a search within the context of the fourth amendment.

This Court, nevertheless, holds that even though the officers were in a place they had a right to be, the overflight was a violation of petitioner's reasonable expectation of privacy. Riley concludes that the officers were not in public navigable airspace because the helicopter was below the 500 foot minimum for fixed-wing aircraft in a non-congested area. Accordingly, the opinion urges that although petitioner may not have had a legitimate expectation that his greenhouse would not be viewed from a fixed-wing aircraft flying in public navigable airspace, he did have a reasonable expectation that its contents

would not be examined from a helicopter hovering below 500 feet.

This conclusion is contrary to the Supreme Court's decision in Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986). The officers here and the officers in Dow were in a place they had a right to be. The camera used by the agents in Dow allowed them to observe the Dow Chemical Plant at a closer point than a mere 1,000 feet. The maneuverability of the helicopter also allowed the officers in the instant case to observe Riley's greenhouse from a closer point that [sic] 1,000 feet.

Nevertheless, this Court in Riley attempts to distinguish the two based on the intrusive nature of the helicopter itself.

There is nothing in this record to support the conclusion that the helicopter caused any disturbance by hovering and

circling or that it was even noticed by the occupants. In fact, Detective Gell testified that they only flew over the property twice at a level of 400 feet. 400 feet is equivalent to a 40 story office building. Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. "[W]e have never held that potential, as opposed to actual invasions of privacy constitutes searches for purposes of the fourth amendment." Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986); citing United States v. Karo, 468 U.S. 705, 712 (1984). On these facts, nothing in these photographs suggests that any reasonable expectations of privacy have been infringed.

Further, as the Court noted in Katz:

> "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can be just

> as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home."

Katz, 389 U.S. 350. fn.4, citing Griswold v. Connecticut, 381 U.S. 479 (dissenting opinion of Mr. Justice Black).

Thus, while the camera used in Dow may have been more surreptitious than the presence of a helicopter, this is a distinction without difference.

Further, from a technological standpoint, the concept of a helicopter was developed by Leonardo D[a]Vinci in the 15th century and helicopters have been in use since the first quarter of this century. The use of helicopters is not a futuristic technological advance such as concerned the court in Katz.

> "But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, (cites

> omitted) were plainly not aimed at simple visual observations from a public place."

* * *

> "One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future 'electronic' developments that could stealthily intrude upon an individual's privacy. Ciraolo, 90 L.Ed.2d 217, 218.

Beyond the fact that there is little support for this Court's conclusion that for an aerial viewing to be proper it must be from above minimum altitude levels for fixed-wing aircraft, there is also little support for this Court's conclusion that the helicopter in the instant case was not in public navigable airspace. See, 14 C.F.R § 91.79(d), 49 U.S.C.A. § 1301(26), and Griggs v. Allegheny County, 369 U.S. 84, 7 L.Ed.2d 585, 82 S.Ct. 531, rehr'g denied, 369 U.S. 857, 8 L.Ed.2d 16, 82 S.Ct. 931 (1962); see also, California v. Sabo, 95 L.Ed.2d 855 (1987) (White, B., dissenting)

(Court of Appeals holding that helicopter was not in navigable airspace at 400 feet is questionable.). In either case, the fact remains that the officers in the instant case were in a place that they had a right to be and could plainly spot the contraband without the aid of a 'futuristic technological development'.

This Court's concern that the contraband could not just as easily have been discerned by any person casually flying over is also contrary to the Court's holding in Ciraolo and Dow. Clearly in Ciraolo, the likelihood that a passenger on a plane might observe private activities, and might connect those activities with particular people, was simply too trivial to protect against. See, Ciraolo, 90 L.Ed.2d at 223 (Powell, L., dissenting). Further, the Court in Ciraolo also made it clear that a focused

surveillance does not violate fourth amendment rights against search and seizure.

It is clear that any helicopter pilot or passenger properly flying in this airspace could have seen everything that these officers observed. Based on similar facts, the Court in Ciraolo readily concluded that respondent's expectation that his garden was protected from such observation was unreasonable and was not an expectation that society was prepared to honor.

Justice Harlan's observations in Katz made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation has not been intercepted. Katz does not translate into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft -- or by

a power company repair mechanic on a pole overlooking the yard. Ciraolo, supra, 90 L.Ed.2d at 217.

Accordingly, this Court has overlooked and misapprehended the fact that petitioner did not exhibit a subjective expectation of privacy that no one would observe his unlawful gardening pursuits, and that because the officers were in a place they had a right to be when they spotted the contraband, the overflight did not constitute a search within the context of the fourth amendment.

WHEREFORE, based on the foregoing reasons and citations of authority, respondent respectfully prays this Honorable

Court to grant the instant Motion for Rehearing and reverse its decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Marc H. Salton, Esquire, 4911 C.R. 54, New Port Richey, Florida 33552, this 23rd day of July, 1987.

/s/ C.M. Sunderland
OF COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA
FRIDAY, SEPTEMBER 11, 1987

MICHAEL A. RILEY,)

Petitioner,)

vs.)

STATE OF FLORIDA,)

Respondent.)

CASE NO. 67,906

District Court of Appeal, 2d District - No. 84-2818

On consideration of the motion for rehearing filed by attorney for respondent,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

By: /s/
Chief Deputy

cc:
Hon. William A. Haddad, Clerk
Hon. Joseph E. Pittman, Clerk
Hon. Hon. W. Lowell Bray, Jr., Judge

Candance M. Sunderland, Esquire
Marc H. Salton, Esquire

IN THE SUPREME COURT OF FLORIDA
FRIDAY, SEPTEMBER 25, 1987

MICHAEL A. RILEY,)

Petitioner,)

vs.)

STATE OF FLORIDA,)

Respondent.)

CASE NO. 67,906

District Court of Appeal, 2d District - No. 84-2818

On consideration of the motion to recall mandate in the above cause filed by attorney for respondent,

IT IS ORDERED that the proceedings in this Court, the District Court of Appeal, Second District, and the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida, are hereby stayed to and including October 12, 1987, to allow respondent to seek review in the Supreme Court of the United States and to obtain any further stay from that Court.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

cc:
Hon. William A. Haddad, Clerk
Hon. Joseph E. Pittman, Clerk
Hon. W. Lowell Bray, Jr., Judge

Candance M. Sunderland, Esquire
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CERTIFICATE OF SERVICE

I, Cloyce L. Mangas, Jr., a member of the Bar of this Court, certify that three copies of the foregoing Joint Appendix were served this 28th day of April, 1988, by mail, postage prepaid, upon the following counsel:

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